

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP EUGENE FEGLES,

Appellant.

No. 32848-8-II

UNPUBLISHED OPINION

HUNT, J. — Phillip Eugene Fegles appeals his convictions for two counts of methamphetamine delivery and one count of methamphetamine possession. He argues that the trial court: (1) denied his right to confront witnesses by limiting the scope of cross-examination of the State’s confidential informant; (2) erred in denying his motion for a new trial based on newly discovered evidence; and (3) admitted improper opinion testimony concerning his guilt. In his Statement of Additional Grounds¹ (SAG), Fegles also argues that the prosecutor’s charging decisions with respect to another suspect engaged in controlled purchases with the same informant denied him (Fegles) equal protection of the law. Finding no error, we affirm.

¹ RAP 10.10.

FACTS

I. Controlled Substance Delivery and Possession

A. Confidential Informant's Agreement with the State

Kelso police arrested drug dealer Tracy Cadena as she attempted to use a stolen credit card at a local mall. Her purse contained assorted illegal drugs, scales, packaging material, stolen identity items, and a stolen credit card.² During her arrest, Cadena lied to police officers, twice provided false names, and told police that she would “do anything and tell [them] anything to stay out of jail or prison.”³ Report of Proceedings (RP) (Aug. 30 - Sept. 2, 2004) at 375.

The State charged Cadena with forgery, possession of stolen property, and seven drug-related counts. She faced a possible sentence of 60 to 128 months confinement for the drug charges. She offered to work for the Cowlitz-Wahkiakum County Drug Task Force (Task Force) as a confidential informant, making controlled drug purchases. The State agreed to drop the drug charges, thus reducing her potential sentence for the remaining charges to two to six months of confinement, if she fulfilled the terms of her confidential informant contract.

As part of the contract, Cadena agreed to refrain from illegal activity and the use of illegal drugs. Her task-force handler could require her to submit to urinalysis tests (UAs) upon request and Cowlitz County Offender Services could impose random UAs as a condition of her release from jail on the pending charges. Subsequently, Offender Services told Cadena that she would have to submit to a UA and Cadena immediately admitted to having used methamphetamine the

² Cadena had also used the stolen credit card to purchase a ring. The record is not clear about whether the ring was on her person at the time of arrest or was later found at her house.

previous day. She served 24 hours in jail for this violation. According to Cadena, she did not use drugs between her release from jail and her testimony at trial.

B. Controlled Purchases

Cadena executed three controlled purchases of methamphetamine from Phillip Fegles. She executed two of the purchases, on May 13 and May 25, 2004, in a very similar fashion. After corrections officers performed a pat-down search of her person and found no drugs or money, Task Force officers gave Cadena recorded currency and drove her to a motel,³ where she met with Fegles in a motel room. She stayed in the room with Fegles between five and ten minutes and returned to the Task Force officers with a baggie of methamphetamine that she said Fegles had sold to her.⁴ Corrections officers then searched Cadena again and found no money or drugs. The motel registry for the second purchase showed that Fegles had rented the room.

The third controlled purchase occurred on June 11, 2004. Cadena met with Task Force Officers, one of whom performed a pat-down search of her person and again found no drugs or money. They drove to a grocery store in Longview, where Cadena had arranged to meet Fegles to deliver the buy money; he did not have any drugs in his possession at the time. Cadena waited by a telephone booth until Fegles drove into the parking lot, entered Fegles's car for a brief moment, gave Fegles \$200 in Task Force currency, and exited the car.

³ The first purchase occurred at the Super 8 motel, and the second purchase occurred at the Motel 6, both in Kelso.

⁴ Although the Task Force officers watched the motels and saw Cadena enter and exit, no officer actually observed the drug transactions inside the motel rooms. During the first transaction, however, one officer walked by the motel room and heard a male voice that sounded like Fegles from inside the room.

Fegles drove away to get the drugs. The Task Force officers picked up Cadena, performed a pat-down search, and, again, found no drugs or money. For several hours thereafter, officers followed Fegles as he drove around Longview. Eventually Cadena contacted Fegles by cell phone and arranged to meet him at the “Store ‘N Deli” to pick up her drug purchase. 2 RP (Aug. 30-Sept. 2, 2004) at 251.

Fegles arrived around midnight,⁵ Cadena entered his car, and they drove into an alley behind the deli. Within a minute, Cadena walked out from behind the deli, walked up to another car, and then returned to the Task Force officers. Cadena gave the officers a baggie of methamphetamine she purchased from Fegles and told them that, at Fegles’s request, she also delivered a quantity of methamphetamine to the driver of the other car. An officer searched Cadena and found no drugs or money.

The officers arrested Fegles and recovered 1/4 ounce of methamphetamine on his person, a cell phone, and \$2,867 in cash.

II. Procedure

The State charged Fegles with three counts of unlawful delivery of a controlled substance, methamphetamine, and one count of unlawful possession of a controlled substance, methamphetamine.

⁵ Although no Task Force officers actually witnessed the transaction, they identified Fegles driving his car.

A. Pretrial

Before trial, the State moved to preclude Fegles from eliciting the factual circumstances underlying Cadena's arrest, including that Cadena lied to police officers about her identity and about a ring purchased with a stolen credit card. Fegles argued that this evidence was admissible to demonstrate Cadena's bias and to impeach her credibility.

The trial court ruled that (1) Cadena's arrest for drug, forgery, and possession of stolen property; the State's dismissal of the drug charges; the remaining forgery and stolen property charges; and Cadena's corresponding, substantially reduced, potential sentence, were admissible to show Cadena's bias and prejudice based on her legal status; (2) Cadena's statement to police, that she was willing to do anything to avoid punishment, was admissible; and (3) the amount and variety of drugs in Cadena's possession at the time of her arrest was admissible to show her access to drugs, which supported Fegles's theory that Cadena was the dealer and able to obtain methamphetamine without his assistance.

The trial court did not allow evidence of Cadena's deceptive conduct toward the arresting officers, including lying about her identity, and the stolen ring and credit card. The trial court ruled this evidence inadmissible as specific acts of misconduct under ER 404(b) and as improper impeachment under ER 608(b) because these charges were still pending, Cadena had not yet been convicted, and these lies were not related to the case against Fegles. In support of this ruling, the trial court recited the following text from ER 608(b), as "almost a restatement of 404," 1 RP (Aug. 30-Sept. 2, 2004) at 26:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the [witness's] credibility, other than conviction of crime as provided in